Editor's note: Appealed -- aff'd, Civ. No. 1757-12 (D.Nev. Feb. 7, 1973), motion to set aside judgment denied (March 5, 1973); Overruled to the extent inconsistent with decision of the Acting Secretary, 85 I.D. 89 (April 21, 1978) -- See 6 IBLA 284A th I

DUNCAN MILLER

IBLA 72-221 Decided June 30, 1972

Appeal from a decision of the Riverside district and land office, Bureau of Land Management, (BLM) denying suspension of oil and gas lease Riverside-031 and return of rentals previously paid thereunder.

Affirmed.

Oil and Gas Leases: Suspensions: Termination

> Applications by lessees for relief of producing requirements must be made to the regional oil and gas supervisor of the Geological Survey. No suspension of operations and production will be granted on any lease in the absence of a well capable of production except when the Secretary directs a suspension in the interest of conservation.
>
> This Department is not authorized to suspend a noncompetitive oil and gas lease so as to revive and extend the lease term.

APPEARANCES: Duncan Miller, pro se.

OPINION BY MR. FRISHBERG

The appellant's oil and gas lease was issued effective April 1, 1962. In the absence of any extension authorized by law it was due to expire on March 31, 1972. In October 1971, during the seventh month of the tenth and final year, the lessee requested a suspension of the lease and a return of all rentals previously paid because "the Condors have created a situation where exploration activities in the area of the captioned lease have been inhibited." The decision denying the request stated that there is no authority authorizing a suspension of the lease and a return of the rental payments.

Inherent in the appellant's application and acceptance of a lease is his agreement to be bound by the terms of the regulations which, in pertinent part, provide that applications for suspension of operations and production shall be filed in the office of the Regional Oil and Gas Supervisor of the Geological Survey (not in the land office of the BLM) and that:

> * * * as to oil and gas leases, no suspension of operations and production will be granted on any lease in the absence of a well capable of production on the leasehold, except where the Secretary directs a suspension in the interest of conservation * * *. 43 CFR 191.26 (1954) now 43 CFR 3103.3-8 (1972).

Even if the BLM were authorized to grant a suspension, the fact remains that the subject lease expired at the end of the tenth year, and there is no statutory authority, in the circumstances of this case, to reinstate and extend a lease which expired by the running of its term. See 30 U.S.C. §§ 188, 226 (1970).

Therefore, pursuant to the authority delegated to the Board of Land Appeals, by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decision appealed from is affirmed.

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Newton Frishberg, Chairman

We concur:

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Anne Poindexter Lewis, Member

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Joseph W. Goss, Member

JONES-O'BRIEN, INC.

1 SEC 13 Decided April 21, 1978

SUSPENSION DENIED.

1. OIL AND GAS LEASES: SUSPENSIONS-OIL AND GAS LEASES: TERMINATION

A nonproducing oil and gas lease expires and may not be retroactively suspended when there is no suspension application pending at the time of expiration. The filing of an application for permit to drill and Geological Survey's delay in acting on the application do not create a de facto suspension of the lease.

Robert E. Mead, 62 I.D. 111 (1955), overruled.
Duncan Miller, 6 IBLA 283 (1972), overruled to the extent inconsistent.

OPINION BY
OFFICE OF THE SECRETARY
DECISION

STATEMENT OF FACTS

On Aug. 1, 1967, the Department of the Interior issued two 10-year noncompetitive oil and gas leases, ES 2538 and ES 2539 in Perry County, Miss., to Arthur E. Meinhart. Meinhart assigned an undivided fifty percent interest in each lease to Irwin Rubenstein. On Sept. 1, 1967, the Bureau of Land Management approved further assignments from Meinhart and Rubenstein of their respective interests in the leases to Beard Oil Co. Almost 10 years later, on May 3, 1977, Beard designated Jones-O'Brien, Inc. as operator for portions of ES 2538 and ES 2539.

Neither the lessee nor its predecessors in interest made any formal effort to develop either of these leases until they were near expiration. According to a chronology prepared by T. F. Jordon, 1/ Vice President of Jones-O'Brien, the first concrete efforts to begin drilling on the leased lands occurred on May 3, 1977, when Jordon attempted to make arrangements to have a drilling rig be available by July 25, 1977, six days before the expiration of the lease. 2/ On June 21, 1977, forty days before the leases were to expire, Jones-O'Brien submitted a complete Application for a Permit to Drill (APD) to the Geological Survey's District Engineer for the area in which the leased lands are located. 3/

Due to a heavy workload, including the correction of a pollution problem at another site, the District Engineer was unable to complete the work required as a prerequisite to the approval or denial of the.

1/ Memorandum from T. F. Jordan, Jr. to Paul F. O'Brien, Jr. dated Aug. 5, 1977. We note that although the memorandum is dated Aug. 5, 1977, it describes events occurring until Sept. 30, 1977.
2/ The chronology further indicates that the rig would not, in fact, have been available until the end of September.
3/ The operator submitted an APD on June 16, 1977. However, since the application was not complete, the district engineer requested additional data the next day. The necessary data were received on June 21, 1977. (See Nov. 2, 1977 memorandum from the District Engineer to the Eastern Area Oil and Gas Supervisor for Operations.)

APD before the expiration of the leases on July 31, 1977. Further, for the same reasons, the District Engineer did not notify Jones-O'Brien in writing that its application would not be acted upon as provided by NTL-6, 41 FR 18116 (1976). The record indicates that the applicant believed, apparently as a result of conversations its representatives had with the District Engineer, 4/ that it was automatically entitled to a lease extension if the application was not acted upon before the expiration of the lease. 5/

The Geological Survey took no written action on the APD until August 19, 1977, when the District Engineer informed Jones-O'Brien that his office had been unable to complete an environmental assessment and that it should file a request for suspension of operations and production." 6/ On Aug. 29, 1977, nearly a month after the leases had expired, the Geological Survey received a written request for suspension for these leases. On Feb. 9, 1978, Jones-O'Brien filed a letter in support of its suspension application.

A noncompetitive oil and gas lease is issued for a primary term of 10 years and continues for as long after its primary term as oil and gas is produced in paying quantities. 30 U.S.C. 226(e) (1970). A single two-year extension can be earned if the lessee was diligently conducting actual drilling operations on the date the primary term of the leases was to expire. 30 U.S.C. § 226 (e) (1970); Enfield v. Kleppe, No. 76-1737; 566 F.2d 1139 (10th Cir., Dec. 16, 1977). The two-year extension was added by Congress in 1960 to provide an "impetus toward exploration for oil and gas and reward those who do so diligently." H.R. Rep. No. 1401, 86th Cong., 2d Sess. at 5.

Normally, a lease automatically expires in the absence of either production or diligent drilling on the date the primary term of the lease expires. A lease which might otherwise terminate can be preserved by a suspension. 30 U.S.C. § 226(f)(1970). There was neither production nor drilling on the expiration date of the leases involved in this case. 7/ The leases were not suspended on that date. In the absence of other circumstances, such as a retroactive suspension, both leases expired by operation of law.

For a variety of reasons, however, Jones-O'Brien contends that

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4/ See Feb. 6, 1976 Affidavit of Thomas F. Jordon, Jr. We assume throughout the decision that the District Engineer made this representation to the applicant. But see also, n. 11. at p. _ below. We also note that at the time this advice was allegedly given, the U.S. Geological Survey, Conservation Division Manual stated, "There is no authority for reinstating a lease by making a suspension retroactive and all applications for a suspension received after a lease expiration date will be handled accordingly." CDM 646.3.3G

5/ Memorandum from Eastern Oil and Gas Supervisor, through Conservation Supervisor, to Acting Chief, Conservation Division (Oct. 4,1977).

6/ This letter states that the expiration date of the leases was Aug. 31, 1977. The District Engineer subsequently recognized and corrected the error in the Nov. 2, 1977 memo referred to above.

7/ On July 1, 1977, the Geological Survey approved communitization agreement E-47 covering both leases. Drilling on one lease under this agreement could be considered to benefit both leases.

the Secretary should now suspend the lease, and approve the application to drill. The question presented is whether the Secretary may now suspend these leases effective at some time prior to their expiration on the basis of a suspension application filed subsequent to their expiration date.

DISCUSSION

The Mineral Leasing Act of 1920 authorizes the Secretary of the Interior to suspend oil and gas leases for several reasons, including in the interest of conservation, 30 U.S.C. § 209 (1970); 43 CFR 3103.3-8. The Department may suspend a lease in the interest of conservation where action cannot be taken on an application because of the time needed to comply with NEPA. See Solicitor's Opinion, 78 I.D. 256, 260 (1971); Gulf Oil Co. v. Morton, 493 F. 2d 141 (9th Cir. 1973); Union Oil Co. v. Morton, 512 F.2d 743 (9th Cir. 1975). The Secretary is under no obligation to suspend; he may do so in his informed discretion after making the necessary finding that a suspension is in the interest of conservation. E.g. U.S. Oil and Development Corp., A-26269 (Oct. 30, 1951). See Stickelman v. United States, 563 F.2d 413, 416 (9th Cir. 1977).

If a lease is in a nonproducing status (as are the leases involved here), only the Secretary of the Interior may approve a suspension and that suspension may be done only in the interests of conservation. 43 CFR 3103.3-8(a). According to the Department's regulations, "A suspension shall take effect as of the time specified in the direction or assent of the Secretary." 43 CFR 3103.2-8(c). The regulations also state that a suspension application is to be filed in triplicate with the Oil and Gas Supervisor. 43 CFR 31O3-8(a). Neither the statute nor the regulations explicitly state when an application must be filed (before or after the lease expires) or whether a suspension may be granted retroactively.

In U.S. Oil and Development Corporation, supra, an oil and gas lessee whose lease was in a nonproducing status filed a suspension application 19 months after the lease expired. The Department raised but did not decide the question whether a suspension application could be granted retroac-tively, i.e., to revive the expired lease. Instead, it said that assuming the authority existed it should only be exercised where the lessee exercised "due diligence" to seek that relief and held that the filing of an "informal application" 19 months after the lease term ended was not diligent. The decision also noted:

> The practice of reviving, through the "assent" procedure under Section 39, oil and gas leases long since expired would adversely affect the stability of the administration of the oil and gas provisions in the Mineral Leasing Act.

U.S. Oil and Development Corp., supra, at 2.

A similar result was reached in Eagle Consolidated Oil Co., A-26259 (Jan. 3, 1952), where the Department denied a suspension request of an applicant who waited 29 months after lease expiration to apply for a suspension. The language in U.S. Oil and Development Corp., that retroactive suspensions would adversely affect the stability of the administration of the Mineral Leasing Act was cited favorably.

Three years later, in Robert E. Mead, 62 I.D. 111 (1955), the Department against addressed the question of retroactive suspensions. Mead had received a partial assignment of a 5-year oil and gas lease due to expire Apr. 30, 1953. The lease was in producible status, but the well was shut-in for lack of transportation when the primary term expired on Apr. 30, 1953. On May 20, 1953, Mead (and the operator of the lease, Griffith Moore) filed a request for a lease suspension. The supervisor denied the suspension request as untimely filed; Mead and Moore appealed. Two other facts are pertinent:

> (1) Moore entered active military service on Apr. 17, 1953, and was on active duty until May 5, 1953.
>
> (2) Appellants had spent over $18,000 to drill two wells and had discovered marketable gas.

The decision noted that the Department had previously examined but not resolved the question of retroactive suspensions and discussed whether this application met the "diligence" standards established in those cases. Its review of the factual situation indicated that:

> * * * a lessee is not obligated to request a suspension of operations even though he may be entitled to it. * * * In other words, if the appellants had not requested a suspension until Apr. 30, 1953, the Department could not complain that they had not exercised due diligence in requesting the suspension. * * *

62 I.D. at 114. The decision went on to hold that the filing of the suspension application 20 days after the lease expired was timely, and that if legally acceptable, the suspension application should be granted in view of:

> (1) the absence of a lack of due diligence in applying for a suspension;
>
> (2) the substantial expenditures * * * which resulted in a well capable of production; and
>
> (3) [the finding] that a suspension * * * would * * * be in the interest of conservation * * *

The decision approved a retroactive suspension on the grounds that it is not expressly barred by sec. 39, and that it is "necessary" to give sec. 39 its full intent. 62 I.D. at 115. The decision does not distinguish the problems discussed in U.S. Oil and Development Corp. supra or Eagle Consolidated Oil Co., supra, or the distinction between applications filed before and after the lease term expired. It also concludes, without citation, that sec. 39 allows revival of the lease terms.

United Manufacturing Co., 65 I.D. 106 (1958), seems to have reached a result in conflict with Mead. In United Manufacturing,

a lease had automatically terminated because the lessee had failed to pay timely the fourth year's rental. The company raised the argument, among others, that the Department could retroactively suspend the lease and wipe out its failure to pay the rental. Although Mead was decided only three years previously, it was not cited or discussed in United Manufacturing; instead, the decision asserted that "the Department has never expressly ruled on the question whether the first sentence of sec. 39 confers authority on the Secretary to waive, suspend or reduce rentals which have accrued before any request is made for waiver, suspension or reduction of the rentals." (Emphasis added). 65 I.D. at 117.

The decision went on to reject the notion that this authority existed, citing William Aherns, 59 I.D. 323 (1946), as a contemporaneous construction of sec. 39 that expressed doubt about retroactive suspensions. United Manufacturing also concluded that the legislative history of the 1946 amendments to sec. 39 suggests "that the Secretary was not intended to be given authority to waive rentals retroactively. 65 I.D. at 117. The Department concluded that it had no authority to suspend a lease retroactively to waive failure to pay rent on time. 65 I.D. at 119. 8/ See also Franco Western Oil Company, 65 I.D. 316, 320 (1958), aff'd sub. nom. Safarik v. Udall, 304 F.2d 944 (D.C. Cir.), cert. den., 371 U.S. 901 (1962) (assignments must be filed prior to last month to earn extension but decision to approve can be made after lease term expires); Solicitor's Opinion, 64 I.D. 309 (1957) (issuance of leases, assignments and request for suspensions may be back-dated to date of application).

In Duncan Miller, 6 IBLA 283 (1972), the lessee had filed a suspension application before the lease expired (in the 7th month of the 10th year) with the Bureau of Land Management (BLM) instead of the Geological Survey as the Department's regulations require. The BLM denied the application and the lessee appealed. On appeal the IBLA affirmed the decision and said

> [e]ven if BLM were authorized to grant a suspension, the fact remains that the subject lease expired at the end of the tenth year, and there is no statutory authority, in the circumstances of this case, to reinstate and extend a lease which expired by the running of its term.

Miller established a rule at variance with both Mead and United Manufacturing. It asserts that if the Department does not act on a suspension application before the lease term expires, it loses all authority to act. Significantly, the case reaches this conclusion without any discussion of prior departmental precedent or reference to the history of sec. 39. Its conclusions are

8/ Although Congress subsequently changed the Department's authority to reinstate oil and gas leases terminated for failure to pay rent, for example, Act of May 12, 1970, 84 Stat. 206, 30 U.S.C. § 188(c) (1970), it has not changed the suspension authority.

baldly stated without any supporting rationale.

Finally, and most recently, in an unpublished (and unnumbered) opinion, the Acting Deputy Solicitor concluded that a retroactive suspension could only be granted where the application was filed before the lease expired. Memorandum from Acting Deputy Solicitor to Assistant Secretary Energy and Minerals, Subject: Suspensions of Operations and Production for Onshore Oil and Gas leases C-15001 and C-15019 (May 10, 1977). Those two lessees had filed APD's, approximately one month before the primary term was expired. After being informed that the Geological Survey could not act on those applications in time, the lessees promptly (before the lease expired) applied for suspensions. The Department did not act on the applications prior to lease expiration. The Acting Deputy Solicitor informed the Assistant Secretary that it would be proper to suspend the leases and make the suspensions effective from the date of the application because they were filed before the lease expired. This conclusion is consistent with the directions to the Geological Survey in the Conservation Division Manual previously quoted on p.2 n.4.

The Acting Deputy Solicitor's memorandum notes that the Mead decision which approved a retroactive suspension based on a suspension application filed after the lease expired, "makes no real attempt to explain the legal authority for what amounts to a reinstatement of the lease." Memorandum at 3. Analogizing to the rules for extension of 5-year leases, the Acting Deputy Solicitor concluded that the "filing of an application [prior to lease expiration] throws the lease into a state where expiration is at least delayed to allow for processing of the application." Memorandum at 4.

[1] For a combination of reasons, I have concluded that the Acting Deputy Solicitor's Opinion correctly states the authority available to me under sec 39; nonproducing leases may be suspended retroactively in the interest of conservation if a suspension application is properly filed before the lease expires. 9/

First, in several situations the Department has considered whether documents filed after a lease or permit expires have any effect. In each instance, the Department decided they do not on the grounds that nothing was "in esse" at the time the approvals were sought. See Utah Power and Light Co., 14 IBLA 372 (1974); (prospecting permit cannot be assigned after the permit expired); Solicitor's Opinion, 64 I.D. 309 (1957) (application for assignment filed prior to lease expiration can be basis for extension while application filed after expiration cannot.) An application filed before

9/ Having reached this conclusion, it is unnecessary to decide whether, after full consideration of the facts, this would be a proper case for the exercise of the discretionary power to suspend if that power were available. Granting a suspension in this and like cases might encourage lessees to postpone diligent development of oil and gas leases until the last month of a 10-year lease and thus diminish the ability of federal lands to contribute to this Nation's energy supply.

the lease expires, can be viewed as preserving the right of the Department to act on the application. If a suspension application is not filed prior to the lease expiration, the lease ends totally and there is nothing in existence for the Department to suspend. Cf., J. P. Hinds, 83 I.D. 275 (1976) (the Department cannot breathe life into a mining claim located on withdrawn lands by retroactively revoking the withdrawal.)

Second, the same rule that governs suspensions to prevent leases from automatic termination because the lessee failed to pay the annual rental on time must govern suspensions to prevent automatic expiration of a lease the end of the primary term. The authority to suspend in both cases comes from sec. 39, 30 U.S.C. § 209 (1970), find both involve leases ending by operation of law. In the former instance the rule in the Department has been clear and consistent since 1946; i.e., the Department lacks authority to suspend a lease which terminated by operation of law for failure to pay advance rent when no suspension application was filed before the lease terminated. United Manufacturing Co. supra; William Aherns, supra.

This result is sound from both a legal and policy viewpoint. The lack or authority to suspend in the rental situation has been made clearer by Congressional action subsequent to United Manufacturing. Although the Mineral Leasing Act still requires automatic termination of a lease for failure to pay rental on time, in 1970 Congress devised a system that calls for strict compliance with the terms of the statute, but allows reinstate-ment in specified situations. If the rental payment is not made on time, a lease can be reinstated only if the failure to pay was either justifiable or not due to a lack of diligence. Louis Samuel, 8 IBLA 268 (1972), appeal dismissed, Civil No.74-1112-EC (C.D. Cal., Aug. 26, 1974). If the Department had the authority to revive leases prior to 1970, the 1970 amendments would have been unnecessary. It would now completely frustrate Congress' intent to invent another system to reinstate terminated leases. Since sec. 39 has not and cannot be construed to reach that result in the rental situation, it cannot be construed to reach that result here.

Third, NTL-6, as discussed more fully later in this decision, has changed the rule on what constitutes a diligent application for a suspension. Specifically, it puts lessees on notice that if an APD is not timely approved, they have the burden of protecting their lease rights. 42 FR at 18116. While at the time of Mead it may have been proper to assert that a lessee had no obligation to request a suspension until the last days of the lease term, that presumption is no longer justified.

Fourth, I do not agree with the assumption in Mead that the ability to suspend under the facts there (and here) are "necessary to ad-

minister the Mineral Leasing Act." The contrary is true. The right to file a suspension application long (or shortly) after a lease has expired creates the possibility for fraud and other abuses. A subsequent lessee could properly consider a late-filed suspension application to be a significant cloud on a subsequently issues lease for that land and would probably defer expenditures until the question was resolved. As the Department said in U.S. Oil and Development Corp. supra, reviving leases retroactively would adversely affect the stability of the administration of the Mineral Leasing Act. For all of these reasons, Robert E. Mead, 62 I.D. 111 (1955) is overruled. 10/

The applicants also make two other arguments in support of their request for suspension. They are:

> (1) That a verbal request for a suspension prior to the date of lease expiration in combination with a written request within a reasonable time thereafter satisfies the regulatory requirement, and
>
> (2) that delay in action on the drilling permit application cause a de facto suspension of operations.

Neither argument is persuasive. First, the Department's suspension regulations specifically require a suspension application to be filed in writing in triplicate with the oil and gas supervisor. There is no authority to waive that requirement. In the past, the Department has held that a written application filed in the wrong office was improperly filed. Duncan Miller, supra. All persons dealing with the government are presumed to have knowledge of its regulations. 44 U.S.C. § 1507 (1970). Here, the regulations clearly and unequivocally require a suspension request to be in writing. 43 CFR 3103.3-8(a). An oral request does not meet the requirements of that regulation. 11/

Second, the Department has never recognized a de facto suspension of a lease. A de facto suspension is not consistent with the Department's regulations which, for nonproducing leases, require the Secretary to order a suspension. Moreover, there is no basis to find a de facto suspension here. Jones-O'Brien had working knowledge of NTL-6 and refers to it in at least one letter to the Department. NTL-6 informs all applicants for drilling permits that plans should be submitted at least 30 days in advance of any starting time. It also says, 41 FR at 18117,

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10/ With respect to this point it is proper to act after lease expiration on applications filed before the lease expired. Duncan Miller, 6 IBLA 283 (1972) is overruled to the extent it is inconsistent with this decision.

11/ This decision assumes, but does not decide that an oral suspension request was made prior to lease expiration. An affidavit of Thomas Jordon dated Feb. 6, 1978, states that he requested an "extension" of the lease on July 13, 1977, and on July 30, 1977. Neither of these requests are contained in a chronology prepared by Jordan dated Aug. 5, 1977. For July 13, the Jordan chronology says: "Call to Godfrey. Told him of rig delay (9/20 or 90 days) from last week and offered to write letter telling of delay * * * We will spud with spudder before July 31, 1977 if we get permit and move in big rig later." This chronology indicates that as little as two weeks before the lease expired, the operator was having difficultly getting the needed equipment. The "suspension" request is not even mentioned.

> The early filing of a complete application is no guarantee that approval thereof will be granted within the 30-day period, as environmental considerations or the volume of applications in the affected Federal agencies may result in more than 30-day delay.

Elsewhere NTL-6 says "operators are encouraged to file applications well in advance of the time when it is desired to commence operations." 41 FR 18119. Thus, NTL-6 gives no reason to lead an operator to assume that a de facto suspension would occur if the application was not approved; in fact, it gives the operator every reason to conclude the opposite. NTL-6 even warns operators in the event of delay to "take such appeal or other recourse as is allowed by law and/or regulation." 41 FR at 18117. In this case, the proper step for Jones-O'Brien would have been to file a timely suspension application. 12/

James Joseph
Acting Secretary

12/ NTL-6 does require the Geological Survey to notify the lessee if the application would not be approved on time, a step that was not taken here until after the lease expired. This does not excuse Jones-O'Brien's failure to file a suspension application. In the absence of affirmative action on the APD, the lessee must assume that the application will not be approved, and not the reverse.